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No. 93-1696

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JACK C. SMITH,

Petitioner,

v.

MARVIN T. RUNYON, POSTMASTER GENERAL

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY BRIEF

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ARGUMENT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS IN OTHER CIRCUITS AS TO WHETHER NOTICE TO LOCAL COUNSEL IS IMPUTABLE TO LEAD COUNSEL WHEN LOCAL COUNSEL FAILS TO COMMUNICATE THE NOTICE

In its brief in opposition, respondent attempts to establish that there is no conflict among the circuits as to whether notice to local counsel is imputable to lead counsel by distinguishing cases which held that notice to local counsel need not be imputed to lead counsel. Brief for the Respondent in Opposition ("Resp. Br."), pp. 6-7.

Respondent contends that *Babich v. Clower*, 528 F.2d 293 (4th Cir. 1975), is distinguishable, because the "Fourth Circuit * * * emphasized the appellant's reasonable reliance on the statement by the district court" that a copy of the opinion would be sent to all counsel of record and accordingly local counsel did not independently notify lead counsel of the order. Resp. Br. 7. This case is extremely similar. Here, the district court had established a uniform practice, through the mailing of 29 different documents from 1987 through 1991, of sending all communications to primary counsel as well as to local counsel. Petition for a Writ of Certiorari ("Pet."), pp. 6-7 and n. 4. Thus, local counsel relied on a pattern of behavior established by the court over a four-year period. Moreover, the docket entry for the judgment in this case contains the notation "(cc: all counsel)." Docket entry 191 (contained in the Excerpts of Record submitted to the appellate court). Just as in *Babich*, the court intended a copy of the order to be directly sent to lead counsel. Just as in *Babich*, local counsel "might reasonably have believed that the opinion and order were mailed to appellant's Washington counsel, who was in charge of the litigation, regardless of the language of the local rule."[1] 528 F.2d at 296. Thus, the Ninth Circuit's

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[1] Respondent also attempts to distinguish *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983), by pointing out that in that case none of appellant's counsel received notice of the judgment. Respondent continues by asserting that "[t]he court did not discuss the question whether notice to local counsel is sufficient." Resp. Br. 7. However, the court of appeals in *Mennen* cited *Babich* as "particularly apposite" and described the circumstances of the *Babich* case in support of its own decision to extend the time to file a notice of appeal. 719 F.2d at 570.

determination is directly inconsistent with the Fourth Circuit's holding in *Babich v. Clower*.

Respondent concedes that "service of a judgment on local counsel constitutes notice to a party, absent otherwise misleading conduct by the district court." Resp. Br. 6, n. 7. Respondent then cites four cases for this proposition. This proposition is directly inconsistent with the determination below. The district court's failure to follow its uniform practice of sending papers to both lead and local counsel misled petitioner's counsel. Thus, the decision below is inconsistent with *Babich v. Clower* and respondent's own view of well-established law.

II. THE DECISION BELOW IS IN CONFLICT WITH NUMEROUS DECISIONS OF OTHER CIRCUITS AS TO THE APPLICABILITY OF RULE 60(b)(1) IN CASES WHERE IT IS INVOKED TO EXTEND THE TIME FOR APPEAL

Respondent argues that there is no conflict among the circuits over whether Rule 60(b)(1) of the Federal Rules of Civil Procedure may be applied in cases where a party's excusable neglect arose either during the period for appeal allowed by Rule 4(a)(1) or the 30-day period for filing a motion to extend the time for filing an appeal allowed by Rule 4(a)(5) of the Federal Rules of Appellate Procedure, because none of the cases cited in the petition apply Rule 60(b)(1) in such a case. Resp. Br. 9. Respondent draws too fine a line. The Ninth Circuit divided the cases into two categories, cases where the excusable neglect first arose before expiration of the 30-day period for extending time to appeal under Rule 4(a)(5) and cases where the excusable neglect arose after that period. The 10 cases cited in note 9 of the petition (Pet. 22) involved situations when the

excusable neglect arose after the 30-day period of Rule 4(a)(5). However, none of these cases imposed any requirement concerning when the excusable neglect arose. None of the courts limited their holdings to apply only to cases in which excusable neglect arose after the 30-day period of Rule 4(a)(5).

Thus, each of the cases sets forth a standard for relief under Rule 60(b)(1) which is inconsistent with that of the Ninth Circuit.

III. THE DECISION BELOW CONFLICTS WITH THE DETERMINATION OF THIS COURT IN *PIONEER* AS TO THE MEANING OF "EXCUSABLE NEGLECT"

Respondent attempts to characterize the decision of the Ninth Circuit as consistent with this Court's holding in *Pioneer Investment Services Co. v. Brunswick Assocs., Ltd. Partnership*, 113 S. Ct. 1489, 1495, 1497 (1993), that excusable neglect includes attorney carelessness, inadvertence, and negligence. Resp. Br. 11. Respondent tries to distinguish the facts of *Pioneer* by arguing that counsel's negligence in this case was much more extreme than the negligence excused in *Pioneer*. Resp. Br. 11.

Respondent's attempt to distinguish *Pioneer* does not address the main problem with its position: that this Court set forth a standard in *Pioneer* which is inconsistent with the due diligence standard of *Rodgers v. Watt*, 722 F.2d 456, 460 (9th Cir. 1983) (en banc). See Pet. 25-26. Since the court below used the legal standard rejected by the *Pioneer* decision, this case should be remanded for a finding as to whether counsel's neglect was in fact excusable.

The facts of this case make clear that counsel's neglect was excusable under the criteria of *Pioneer*. Echoing the court of appeals, respondent argues that since the attorneys in *Pioneer* missed the deadline for filing by 20 days rather than 6 months, they were less negligent. Resp. Br. 11; Pet. App. 10a, n. 3. This claim does not withstand examination. In *Pioneer*, lead counsel admitted receiving actual notice of the bar date for filing a proof of claim in a bankruptcy proceeding. 113 S. Ct. at 1492. Nevertheless, the lead counsel missed the deadline. *Ibid.* In contrast, in this case, lead counsel did not receive actual notice of the judgment. Moreover, as is discussed above, lead counsel and local counsel relied on the established practice of the district court to mail lead counsel all orders of the court.

Respondent's distinction between a delay of 20 days and 6 months is irrelevant. The cases cited by respondent itself (Resp. Br. 9, n. 10) make clear that Rule 60(b) relief is available for delays of similar or even longer lengths. See *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 500 F.2d 808, 809-810 (D.C. Cir. 1974) (per curiam) (11-month delay); *Fidelity Deposit Co. v. USAFORM Hail Pool, Inc.*, 523 F.2d 744, 748 (5th Cir. 1975) (109-day delay); *Buckeye Cellulose Corp. v. Braggs Electric Construction Co.*, 569 F.2d 1036, 1038 (8th Cir. 1978) (per curiam) (delay of over one year);[2] *Harnish v. Manatee County*, 783 F.2d 1535, 1537-1538 (11th Cir. 1986) (3-month delay). Hence, the 6-month delay in this case is no bar to Rule 60(b) relief.

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[2] Respondent erroneously states that relief was denied in *Buckeye*. Resp. Br. 9, n. 10. In fact, the court granted Rule 60(b) relief.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, a writ of certiorari should be granted.

Respectfully submitted,

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